No. 10-937

In the Supreme Court of the United States

FAYEZ DAMRA, AKA ALEX DAMRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was required to demonstrate that the government acted in bad faith by deporting a potential witness in order to establish a violation of his Sixth Amendment right to compulsory process.

2. Whether petitioner's trial testimony was sufficient to establish that the testimony of the deported prospective witness would have been material and favorable to petitioner's defense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 621 F.3d 474.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2010. A petition for rehearing was denied on October 26, 2010 (Pet. App. 87a-88a). The petition for a writ of certiorari was filed on January 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of willfully attempting to evade

tax, in violation of 26 U.S.C. 7201; and one count of conspiring with his brother, Fawaz Damra (Fawaz), to defraud the United States, in violation of 18 U.S.C. 371. Petitioner was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. Pet. App. 80a. The court of appeals affirmed petitioner's conviction. *Id.* at 2a.

1. In June 2004, petitioner's brother Fawaz was convicted of unlawfully obtaining citizenship in violation of 18 U.S.C. 1425 by making false statements in a citizenship application and interview. See *United States* v. *Damrah*, 412 F.3d 618, 620 (6th Cir. 2005). He was sentenced to two months of imprisonment, and his citizenship was revoked pursuant to 8 U.S.C. 1451(e). *Ibid.* Around the same time, an Internal Revenue Service (IRS) investigation revealed that for 1999, Fawaz had filed an IRS Form Schedule C reporting $100,000 of income received as a consultant for the software firm Applied Innovation Management (AIM), a California company controlled by petitioner. Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

The IRS served petitioner with a grand jury subpoena and petitioner agreed to answer questions. In a series of interviews, petitioner made numerous conflicting statements and admissions. In his initial interview, petitioner stated that he had founded AIM in 1993 with a partner named Robert Sparkman and that he and Sparkman had approximately 25 investors, including Fawaz, who each invested between $15,000 and $20,000 in the business. The investors, he said, were bought out in 1998 or 1999 for approximately three to four times what they had invested. Pet. App. 3a-4a; Gov't C.A. Br. 4-5.

During a second interview, petitioner explained that, in 1999, he had hired Fawaz as a consultant, because Fawaz had contacts with Arab businessmen. Despite not bringing in any business, Fawaz reportedly called petitioner later in the year seeking $60,000 in compensation. Petitioner stated that he ultimately sent Fawaz $100,000 as a "divorce payment" after receiving a phone call from family in the West Bank "guilting" him into paying Fawaz. Petitioner deducted the $100,000 as a consulting expense. Pet. App. 4a-6a; Gov't C.A. Br. 5-8.

In a third interview, petitioner made numerous damaging admissions. Petitioner admitted that payments made from AIM to family members in the Middle East were to placate his brothers and did not involve business dealings; that he sent checks from AIM to his brother Nader Damra because "he could afford to"; and that some checks were marked "consulting" although Nader was never an AIM consultant. Petitioner admitted that a $32,000 check to Al Adhamieh General Trade was actually a check to his brother Nader and that he had falsely told his accountant that the check was for software development. Petitioner further admitted that although his 1997 and 1998 tax returns showed that petitioner made only approximately $20,000 a year from his company, petitioner used company funds for these payments. Petitioner admitted that Fawaz "had not done $5 of work for AIM" and was not qualified to be an AIM consultant. Petitioner also stated that he could not explain two checks totaling $32,000 and classified as consulting expenses, written from AIM to Charles Schwab setting up a personal account for himself. Pet. App. 6a-7a; Gov't C.A. Br. 8-10.

2. A federal grand jury in the United States District Court for the North District of Ohio returned an indictment charging petitioner and Fawaz with conspiracy to defraud the United States for the purpose of obstructing the IRS's lawful government functions, in violation of 18 U.S.C. 371; and further charging petitioner with committing corporate tax evasion by filing a fraudulent Form 1120 for AIM and by causing funds paid from AIM to Fawaz to be falsely reported as Schedule C gross receipts on Fawaz's Form 1040, in violation of 26 U.S.C. 7201. Pet. App. 7a-8a; Gov't C.A. Br. 10-11.

When petitioner and Fawaz were arraigned, Fawaz was in the custody of Immigration and Customs Enforcement (ICE) in Monroe, Michigan. Having stipulated to removability from the United States, he was awaiting a country to accept him for deportation. Pet. App. 8a-9a; Gov't C.A. Br. 11-13. During a status conference on January 8, 2007, the government advised the court that Israel had agreed to allow Fawaz's passage from Jordan to the West Bank and that Fawaz had been deported on January 2, 2007. The government explained that, given national security concerns, it had been unable to give the district court or the defense any notice.[1] Fawaz's attorney moved to dismiss the indictment. The

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[1] The United States Attorney's Office further explained that "there were serious and imposing national security concerns with Fawaz'[s] deportation, that led to a one-year delay in getting Israeli authority for the transit. With Fawaz'[s] involvement in fundraising and recruiting for the Palestinian Islamic Jihad, there were safety and security concerns for the receiving Israeli agents, and the transporting ICE agents, that mandated an extremely-short window for the deportation, and little or no notice beyond those participating in the deportation decision; the U.S. Attorney's office certainly had no ability to stop the process." Gov't C.A. Br. 28 n.1.

district court denied the motion and issued an arrest warrant providing for Fawaz's arrest, should he ever re-enter the country. Pet. App. 8a-9a; Gov't C.A. Br. 12-14.

At a status hearing on February 13, 2007, petitioner stated, for the first time, that he wanted to call Fawaz as a witness. The government, meanwhile, moved to admit at trial the statements Fawaz had made to tax preparers as the statements of a co-conspirator under Fed. R. Evid. 801(d)(2). Petitioner filed a motion objecting to the admission of this evidence as a violation of his Sixth Amendment rights and arguing that the government was responsible for Fawaz's being unavailable. The district court denied petitioner's motion. Pet. App. 8a-9a; Gov't C.A. Br. 12-14.

3. At trial, IRS Agents Ron Gesell and Gary Rasoletti testified about the statements petitioner made during his interviews with the IRS. Pet. App. 9a; Gov't C.A. Br. 14; pp. 2-3, *supra*. Accountants Alan David and Barbara Burrer testified that AIM wrote numerous checks but did not issue Forms 1099 to individuals that petitioner said were consultants. Burrer testified that she refused to further represent petitioner as a client after warning him twice about his business practices. David and Burrer also testified about a $250,000 check that petitioner wrote to Eigen Software, a business that petitioner started in Las Vegas after closing AIM in 2000, which was deducted on AIM's books as an expense but which the government demonstrated represented some of petitioner's profits from AIM. David testified that petitioner told him the check was for a software development expense to AIM, and Burrer testified that petitioner told her the check was for petitioner's sale of

personally developed software. David testified that "[h]ad [he] known that it was * * * a distribution of personal money, it would have been classified as a liquidating distribution." Pet. App. 10a; Gov't C.A. Br. 14.

Mir Ali testified that he had prepared Fawaz's tax returns for several years, but that he refused to prepare Fawaz's 1999 return because he thought Fawaz was trying to claim income that he had not earned. Ali testified that Fawaz told him that the $100,000 payment was from his brother in California and that Fawaz wanted to report it as his own income because "[his brother] is in the high income bracket." Bernard Niehaus, who ultimately prepared Fawaz's 1999 tax return, testified that he prepared Fawaz's return to include $100,000 of consulting income and that Fawaz never mentioned that the funds came from his brother. Pet. App. 10a-12a; Gov't C.A. Br. 14-17.

Petitioner testified as the sole defense witness. He stated that he had never spoken to Fawaz about Fawaz's taxes and that the $100,000 payment to Fawaz was repayment for Fawaz's having invested $25,000 in AIM in 1992 or 1993. On cross-examination, petitioner denied making any of the statements to which the IRS agents had testified. Petitioner admitted that Fawaz was not qualified to be an AIM consultant, but he stated that Fawaz deserved the money he was paid. Pet. App. 12a; Gov't C.A. Br. 17-18.

The jury found petitioner guilty on both counts of the indictment. The district court sentenced petitioner to 21 months of imprisonment, to be followed by three years of supervised release, and ordered him to pay restitution in the amount of $274,389 and a fine of $50,000. Pet. App. 12a-14a; Gov't C.A. Br. 19-21. The district court

later denied petitioner's supplemental motion for release pending appeal, rejecting petitioner's argument that the government had violated petitioner's Sixth Amendment right to compulsory process by deporting Fawaz before trial. Pet. App. 14a.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-75a. The court rejected petitioner's argument that the government violated his Sixth Amendment right to compulsory process by deporting his brother before trial. The court explained that this Court's opinion in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), in which the Court held that a criminal defendant does not establish a due process violation based on the destruction of evidence "unless [he] can show bad faith on the part of the police," *id.* at 58, had "modifi[ed] or clarifi[ed]" its decision in *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), by adding a threshold requirement that "any defendant arguing [a] violation of his right of compulsory process * * * [must] show that the government acted in bad faith (in, for example, deporting a potential witness)." Pet. App. 24a. The court also noted that other courts of appeals have interpreted *Youngblood* to impose a "bad faith" requirement in compulsory process cases. *Id.* at 24a-25a. The court therefore stated that, in the context of deported witnesses, it would apply a two-prong test to determine whether a defendant's right to compulsory process has been violated, under which the defendant must (1) make a showing that the government has acted in bad faith and (2) make a plausible showing that the testimony of the deported witness would have been material and favorable to his defense. *Id.* at 25a.

The court of appeals concluded that petitioner failed to meet either prong of the test. First, the court stated, petitioner had offered no evidence that the government had acted in bad faith by deporting Fawaz. Pet. App. 26a-27a. Second, the court held, even if he could show bad faith, petitioner "[could] not demonstrate that [his brother's] testimony would have been material and favorable" because petitioner offered nothing apart from "his unsupported (and implausible) claim" that his brother might have testified that they never spoke about Fawaz's 1999 taxes. *Id.* at 27a. The court thus affirmed petitioner's conviction, but remanded for resentencing because it concluded that the district court had committed an error in calculating the amount of tax loss. *Id.* at 75a.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that he was not required to show that the government acted in bad faith by deporting Fawaz in order to establish a violation of his Sixth Amendment right to compulsory process. The court of appeals correctly rejected this claim and its decision does not, as petitioner contends (Pet. 9-19), conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

a. In *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), the Court addressed whether the government violates a criminal defendant's right to compulsory process by deporting potential witnesses before trial. In that case, after law enforcement officers had stopped the defendant's car and arrested several of the passengers, all of the arrestees admitted that they were in the country illegally, and each passenger identified the defendant as the driver. *Id.* at 860-861. The government de-

tained one passenger to testify at defendant's trial on charges of transporting an illegal alien, but deported the other passengers almost immediately after a prosecutor concluded that they "possessed no evidence material to the prosecution or defense." *Id.* at 861.

The Court concluded that the deportation of potential witnesses did not violate the defendant's compulsory process rights, explaining that "the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." *Valenzuela-Bernal*, 458 U.S. at 872. The Court explained that "[a]s in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 873-874.

A few years later, in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), the Court addressed whether the government's destruction of DNA evidence that had not yet been tested violated the defendant's due process rights. *Id.* at 58. Citing the Court's statement in *Valenzuela-Bernal* that the government in that case had made a "good-faith determination that [the deported witnesses] possess[ed] no evidence favorable to the defendant," see 458 U.S. at 872, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 57-58. *Youngblood* thus clarified that in cases involving "what might loosely be called the area of

constitutionally guaranteed access to evidence," *id.* at 55 (quoting *Valenzuela-Bernal*, 458 U.S. at 867), a defendant must demonstrate that the government acted in bad faith to establish a constitutional violation.

Notwithstanding this Court's holding in *Youngblood*, petitioner contends (Pet. 12-14) that compulsory process claims should be treated like claims brought pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), under which a defendant can establish a due process violation if prosecutors withhold evidence that is material and exculpatory "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Petitioner's comparison to *Brady* is misplaced. In *Youngblood*, the Court acknowledged that under *Brady*, "the good or bad faith of the State [is] irrelevant when the State fails to disclose to the defendant material exculpatory evidence," 488 U.S. at 57, but the Court concluded that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Ibid.* As the court of appeals explained, by deporting Fawaz, the government at most eliminated "potentially useful deported-witness testimony not known by the government to be exculpatory," Pet. App. 24a, and *Youngblood*'s bad faith requirement for a constitutional claim involving failure to preserve "potentially useful evidence" therefore applies. 488 U.S. at 58. The court of appeals' decision does not, as petitioner suggests (Pet. 9-11), conflict with *Valenzuela-Bernal* or *Brady*.

b. Petitioner further contends (Pet. 14-19) that the courts of appeals are in conflict as to whether a defen-

dant must demonstrate bad faith to establish a violation of his right to compulsory process. No such conflict exists.

Every court to have squarely addressed the issue has explicitly held that *Youngblood*'s bad faith requirement applies to compulsory process claims. See *United States* v. *Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir.) ("[I]n *Youngblood*, the Court * * * point[ed] to *Valenzuela-Bernal* as an example of a case in which the defendant was required to show bad faith."), cert. denied, 531 U.S. 1026 (2000); *United States* v. *Dring*, 930 F.2d 687, 693-694 (9th Cir. 1991) (stating that "[i]n cases of constitutionally guaranteed access to evidence, wherein the Government loses potentially exculpatory evidence, the Supreme Court applies a two-pronged test of bad faith and prejudice"), cert. denied, 506 U.S. 836 (1992); *United States* v. *Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997) (citing *Valenzuela-Bernal* and *Youngblood* for proposition that defendant must show bad faith to establish compulsory process violation); *Buie* v. *Sullivan*, 923 F.2d 10, 11-12 (2d Cir. 1990) (same); *United States* v. *De La Cruz Suarez*, 601 F.3d 1202, 1212-1213 (11th Cir.) (citing *Valenzuela-Bernal*), cert. denied, 130 S. Ct. 3532 (2010). The court of appeals noted that these circuits had "read [*Youngblood*] as modifying or clarifying *Valenzuela-Bernal* by adding a threshold [bad-faith] requirement," Pet. App. 24a-25a, and stated that its holding would bring the Sixth Circuit "in line with * * * our sister circuits," *id.* at 25a.[2]

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[2] Petitioner notes (Pet. 17-18) that in *United States* v. *Gonzales*, 436 F.3d 560, cert. denied, 547 U.S. 1180 (2006), the Fifth Circuit expressly reserved the question whether a defendant must demonstrate bad faith in order to establish a compulsory process violation. That decision

Petitioner contends (Pet. 15-16) that the First, Fourth, Eighth, and D.C. Circuits "have not required that a defendant asserting a violation of the Compulsory Process Clause demonstrate that the government acted in bad faith." None of the cases petitioner cites demonstrates a conflict on this question. In *United States* v. *Dean*, 55 F.3d 640 (D.C. Cir. 1995), cert. denied, 516 U.S. 1184 (1996), the defendant argued that the district court's order quashing subpoenas she had issued to two senators violated her compulsory process rights. *Id.* at 662. The question whether the district court acted in bad faith in quashing the subpoenas was irrelevant to the court's decision, because the court concluded that the defendant "was not actually prejudiced by the trial court's quashing of the subpoenas." *Id.* at 663. Similarly, in *United States* v. *Filippi*, 918 F.2d 244 (1990), the First Circuit held that the defendant had waived his compulsory process claim, and the court therefore had no occasion to consider whether a defendant must show bad faith to establish such a violation. *Id.* at 248.

The Fourth Circuit's decision in *United States* v. *Moussaoui*, 382 F.3d 453 (2004), cert. denied, 544 U.S. 931 (2005), also does not establish a circuit conflict. In

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therefore cannot be the basis of a circuit conflict. Petitioner also contends (Pet. 17) that the Third Circuit has issued conflicting decisions on the elements of a compulsory process claim. The Third Circuit has clearly stated that a compulsory process claim cannot succeed "absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith." *United States* v. *Sanfilippo*, 963 F.2d 585, 596-597 (1992). In any event, a conflict among decisions of the same court of appeals does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Moussaoui, the Fourth Circuit upheld a district court order requiring the government to produce witnesses who were being held at Guantanamo Bay. *Id.* at 456-457. Because the order was designed to *prevent* a violation of the defendant's compulsory process rights, the court did not consider whether a defendant must show bad faith to establish that such a violation had occurred. Finally, the Eighth Circuit's opinion in *United States* v. *One 1982 Chevrolet Crew Cab Truck*, 810 F.2d 178, 183 (1987), which refers only to a prejudice requirement for compulsory process claims, was issued before this Court's decision in *Youngblood*.[3] The court of appeals' decision is consistent with the decisions of every other court to have considered the question presented, and petitioner has identified no case holding that bad faith is irrelevant to a compulsory process claim. Further review is therefore unwarranted.[4]

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[3] Three of the four state intermediate appellate decisions petitioner cites to demonstrate that state courts are split on this issue (Pet. 19) likewise predate *Youngblood*. The remaining case, *Ramirez* v. *State*, 842 S.W.2d 796 (Tex. Ct. App. 1992), did not consider whether bad faith was required, holding instead that the defendant had waived his compulsory process claim. *Id.* at 799.

[4] Petitioner does not argue that the fact-bound issue of whether the government acted in bad faith by deporting Fawaz is independently certworthy, but the government did not act in bad faith in any event. Petitioner refers (Pet. 3) to an explanation given by Fawaz's counsel at a status hearing that Fawaz was in ICE custody "awaiting deportation" and that "[w]henever the Court needs him to come back here, the Court can order him, and he'll be here for trial or for whatever proceedings the Court deems necessary." Pet. App. 26a-27a. The government's characterization of this summary of Fawaz's immigration status as "accurate" (Pet. 3) cannot fairly be considered a "promise" (Pet. App. 26a-27a) that Fawaz would not be deported before trial.

2. Petitioner further contends (Pet. 20-24) that his trial testimony was sufficient to establish that, had Fawaz not been deported, he would have given testimony that was material and favorable to petitioner's defense. That fact-bound claim does not warrant this Court's review.

Petitioner correctly notes (Pet. 21) that in *Valenzuela-Bernal*, the Court explained that a defendant could establish through his own sworn testimony that testimony of a deported witness would have been material and favorable. See 458 U.S. at 873. The court of appeals did not, however, contradict that statement or hold that a defendant's testimony would never be enough to show prejudice. Rather, the court concluded that in this case, petitioner's testimony was insufficient to meet his burden.

At trial, to defend against charges that he conspired with Fawaz to defraud the United States and caused funds paid from AIM to Fawaz to be falsely reported as Schedule C gross receipts on Fawaz's Form 1040, petitioner testified that the $100,000 payment to Fawaz was repayment for Fawaz's having invested $25,000 in AIM in 1992 or 1993 and that he had never spoken to Fawaz about Fawaz's taxes. Pet. App. 12a; Gov't C.A. Br. 17-18. Although petitioner testified that Fawaz "could have" testified to this effect, the court of appeals concluded that this testimony was unsupported by the evidence. Pet. App. 27a. For example, trial testimony showed that petitioner himself stated that he paid Fawaz $100,000 not as a return on a previous investment, but because his family in the West Bank "guilt-[ed]" him into doing so, and he then wrote off the payment as a consulting expense. *Id.* at 4a-6a; Gov't C.A.

Br. 5-8. Still other testimony showed that Fawaz had told his tax preparer that he wanted to report the $100,000 payment as his own income because "[his brother] is in the high income bracket." Pet. App. 10a-12a; Gov't C.A. Br. 14-17. The court of appeals concluded that in light of this and other overwhelming evidence of petitioner's guilt, Fawaz's testimony would have been implausible, Pet. App. 27a, and the court concluded that "[petitioner's] unsupported word alone is not sufficient * * * where the defendant maintains only that the potential witness 'could explain' or 'might have testified' in some favorable fashion." *Id.* at 26a.

Furthermore, petitioner cannot demonstrate "a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Valenzuela-Bernal*, 458 U.S. at 874. The jury rejected petitioner's testimony that he and Fawaz had never discussed taxes, and there is no reason to believe that the jury would have reached a different conclusion if Fawaz—who had been convicted of naturalization fraud and "likely would have invoked his Fifth Amendment right not to testify" in any event, Pet. App. 30a—had offered similar testimony. The court of appeals' conclusion that there was no reasonable likelihood that Fawaz's testimony would have affected the outcome of petitioner's trial is a case-specific, dispositive holding that does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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